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SUPREME COURT, U.S.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1979

No. 79-5649

IDA VENE ARMOUR, for herself and all others similarly situated,

Petitioner,

VS

CITY OF ANNISTON, d/b/a Anniston Memorial Hospital; and REGIONAL MEDICAL CENTER BOARD, a corporation, d/b/a Northeast Alabama Regicnal Medical Center,

Respondents.

Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Fifth Circuit

Edward Still
Susan Williams Reeves
Attorneys for Petitioner

Suite 400 Commerce Center
2027 1st Avenue North
Birmingham, AL 35203
205/322-6631

November 1979

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Petition for a Writ of Certiorari to the
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for the Fifth Circuit

The petitioner Ida Vene Armour respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on 13 June 1979.

Opinions Below

The opinion of the Court of Appeals is reported at 597 F2d 46 and is reproduced in the Appendix hereto. The Court of Appeals refused to rehear or rehear en banc, 604 F2d 671 (see Appendix).

The opinion of the District Court and its order denying class certification are unreported and are reproduced in the Appendix hereto.

Jurisdiction

The judgment of the Court of Appeals for the Fifth Circuit was entered on 13 July 1979. A timely petition for rehearing en banc was denied on 20 August 1979 and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 USC §1254(1).

Questions Presented

1. Is an appellate court barred, as a matter of law, from reviewing a denial of class certification made prior to the trial court's determination (affirmed on appeal) that the sole class representative has not suffered racial discrimination prohibited by Title VII of the Civil Rights Act of 1964, as amended?

2. Does an individual employee who was discharged and unsuccessfully alleges racial discrimination "possess the same interest and suffer the same injury" as class members who have allegedly suffered from racially discriminatory employment practices?

3. Does the requirement that a class representative have "nexus" with putative class members impose an unlawful requirement outside the scope of Federal Rule of Civil Procedure 23?

4. Is it clearly erroneous for a District Court to credit the oral ex post facto rationalizations of an employer concerning a discharged employee when those rationalizations are contradicted by the employer's contemporaneous written records and when the employer violated its own rules in the method used to discharge the employee?

Statutory Provisions Involved

Civil Rights Act of 1964, Title VII, Sec. 703 as amended [42 USC §2000 e-2(a)]:

Section 703(a) It shall be an unlawful employment practice for an employer --

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or priviledges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex or national origin.

* * *

Federal Rules of Civil Procedure, Rule 23(a):

(a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

Statement of the Case

This is an action under Title VII of the 1964 Civil Rights Act, 42 USC §2000e et seq, alleging racial discrimination in employment at the Anniston Memorial Hospital (now known

as the Northeast Alabama Regional Medical Center). The case was originally filed as an individual claim but, after discovery, was amended to state claims on behalf of a class of all present and former employees. The plaintiff, a practical nurse, sought to represent all black persons who had been and would be employed by the Hospital who had suffered from the racially discriminatory policies of the defendant.

A hearing was held on the plaintiff's motion for class certification, at which the plaintiff presented substantial evidence of widespread and pervasive discrimination (including intentional historical segregation) against blacks in hiring, assignments, and pay. In the Nursing Department there were no black supervisors, head nurses, or department heads; only 4 of 77 Registered Nurses were black; and 52% of the 78 full time Nurse Aides were black. Analysis of hospital records showed that 62% of the blacks employed were in low-skill (and low paying) jobs, while less than 19% of the white employees were in such jobs. 1/

The Hospital had adopted job descriptions which included high school graduation as a job requirement. The job-relatedness of this requirement has never been validated despite the undisputed evidence that the requirement had a disparate impact on blacks. Only 17.7% of blacks over the age of 25 in the Anniston area (Calhoun County) had completed high school, compared to 28.1% of the whites.

The district court stopped the class certification hearing in the middle of the plaintiff's testimony and before she could present several class members as witnesses and asked that additional testimony be presented by affidavit.

1/ "Low-skill jobs" are nurse aide, laundry worker, orderly, hospital attendant, food service worker, domestic worker, environment service assistant, and custodial worker.

The district court refused to certify the class on the following grounds (the order is reproduced in full in the appendix):

(a) The change in administration and "ownership" of the hospital precluded the successor employer's liability for acts while the City was running the hospital. 2/

(b) Ms. Armour had been fired by the City Hospital and had never worked for the Medical Center after the new non-profit board was established.

(c) The City would not be able to provide equitable relief because it no longer controlled the hospital.

(d) Monetary relief (in the form of back pay) 3/ was not awardable to classes certified under Rule 23(b)(2).

A few months later, the District Court held trial on the plaintiff's individual claim and ruled against her. The District Court found "that the sole reason for the discharge of Ms. Armour was that she abandoned her job without seeking or receiving prior permission on February 20, 1972, and that she refused to return to work unless she was transferred to another shift." While the evidence is in dispute over the reason Ms. Armour gave for leaving work on 20 February (she said she had to take care of her own baby, while the Hospital's witnesses said she complained about working with babies in pediatrics), the Hospital witnesses or personnel files show that Ms. Armour called in on each of the next three days to report that she could not come to work because

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2/ The two "separate" entities were represented by one counsel who stated at the commencement of the hearing on class certification that the new Board would pay any back pay due Ms. Armour and that the new Board had assumed "any financial obligations that the City might have incurred in connection with the operation of the hospital***." In addition, evidence was adduced that the personnel director had not changed when the "ownership" changed, that all members of the City hospital board were appointed by the City to the new Board; and that the new Board made no changes of substance in the place or manner of service to the public.

3/ Class actions under Title VII are generally brought as (b)(2) class actions because back pay is an integral part of the equitable relief. Albemarle Paper Co. v. Moody, 422 US 405 (1975).

she had no one to keep her youngest child (a relative who usually babysat was sick). On the third day, she called the Acting Administrator who suggested that she file a request for a leave of absence. She did file with the Civil Service Board a leave request and, at the same time, a complaint against a white head nurse for the manner in which she had treated Ms. Armour while Ms. Armour was a patient at the Hospital.

The Hospital gave as its justification for firing Ms. Armour that she had "terminated herself" when she left her job. This, of course, is inconsistent with the Hospital's own records. In response to Ms. Armour's request for a leave (which would normally be granted pro forma), the Hospital requested that Ms. Armour be discharged (again an admission that she was not yet terminated). No notice of this request was given to Ms. Armour as required by the Anniston Civil Service regulations governing the defendant's employees. The Civil Service Board procedures provide the requisites of due process: notice of charges and a chance to rebut the charges at a hearing. Ms. Armour was denied all of this. The Personnel Director testified that he did not follow the normal procedure because he did not want Ms. Armour to be able to appeal to the Civil Service Board and involve the NAACP in the appeal.

The plaintiff appealed to the Court of Appeals regarding both the individual and the class claims. The Court of Appeals dealt first with Ms. Armour's individual claim and upheld the District Court determination as not clearly erroneous. As to the class issue, the Court expressed the question it was considering to be

> whether an individual can represent a class after the dismissal of her individual claim has been affirmed on appeal where the trial court has held a class certification hearing and [arguendo] incorrectly refused to certify the class. [footnote omitted]

597 F2d at 49. The Court answered this question by holding that

> [h]aving suffered no discrimination at the hands of the defendants, Ms. Armour is prevented by Rule 23 from representing this class.

597 F2d at 50. The Court made this determination of the basis of lack of "nexus" between Ms. Armour and the class. Nexus was defined as the sum of all the criteria of Rule 23(a) and as a separate ingredient of Rule 23(a). 4/ It is unclear which of the requirements of Rule 23(a), the Court found to be lacking except that Ms. Armour had "no claim in common with the other class members" apparently because she "has not been the victim of racial discrimination in her termination." 597 F2d at 49-50.

Reasons For Granting the Writ

I. The decision below shields from appellate review many decisions of district courts who refuse to certify class actions in employment cases.

Three decisions of this Court relating to the dependence of a class on its representative form the backdrop against which the present decision by the Circuit Court must be viewed. In Franks v. Bowman Transportation Co., 424 US 747 (1976), this Court allowed a certified class to continue its suit through a class representative who lost his individual claim after class certification.

In East Texas Motor Freight v. Rodriguez, 431 US 395 (1977), this Court held that class representatives who had not sought certification prior to trial, whose suggested relief had been rejected by a union local representing many class members, and who had not been discriminated against could not represent the class.

4/ Within the same paragraph of its decision, the Court stated, "This [nexus] is nothing more than saying that a class representative must meet all the criteria of Rule 23(a)," and that "both a nexus with the class and adequacy of representation are necessary ingredients under Rule 23(a)."

Finally, Cooper & Lybrand v. Livesay, 437 US 463 (1978), held that the denial of class certification may not be the subject of an interlocutory appeal.

The explicit holdings of these cases make it clear that appellate review of class certification is appropriate only after final judgment and that a properly certified class will not be denied relief simply because its representative has lost his claim. Yet in the absence of proof of the same type of extraordinary lack of concern for the rights and opinions of the class members found in Rodriguez, the Fifth Circuit has now adopted a per se rule that a plaintiff who loses her individual case cannot represent a class which has not been certified. See also, Davis v. Roadway Express, Inc., 590 F2d 140 (5th Cir 1979); Satterwhite v. City of Greenville, 578 F2d 987 (5th Cir 1978) (en banc), petition for cert. filed 47 USLW 3465 (No. 78-1008, 9 Jan. 1979).

At first blush, the Satterwhite Court would not seem to have adopted a per se rule when it said,

> That Ms. Satterwhite's individual claim lacks merit does not, of course, determine that she cannot adequately represent the class, but her lack of nexus with, and membership in the class is fatal.

578 F2d at 992. However, the Court held that Ms. Armour was not a member of the class because she had not proven her individual claim. It should be noted that Judge Rubin, the author of Satterwhite, dissented in Armour, stating that the lack of a certification hearing in Satterwhite was an extra factor militating against Ms. Satterwhite but not present in Armour. Apparently no one else on the Court agreed with him. Petitioner suggests that the Satterwhite and Rodriguez plaintiffs' failure to seek class certification does set them apart from the instant case.

The net effect of the Fifth Circuit's rulings is that a certified class may obtain appellate review despite the loss of the representative's individual claim, but a class which is denied certification will never be able to appeal improper denial unless the representative wins on her

individual claim. We suggest that this is neither logical nor appropriate under Rule 23 which requires that class certification determinations be made on the basis of the claims of the parties rather than their entitlement to relief. If a headless class can proceed when the representative loses under Rodriguez, 431 US at 406 n. 12, certainly it should not be proper to deny certification to Armour-type classes. An affirmation of the Fifth Circuit's holding could forever shield from all review certain class actions simply by the trial court's denial of class certification followed by an adverse decision against the named plaintiff. The Fifth Circuit's answer to this seems to be a conclusory finding that the class representative possesses vel non nexus to the class , see, e.g., Jones v. Diamond, 594 F2d 997 (5th Cir 1979) (class certified, individual claim severed, tried and found to be "wholly without merit," class claims reviewed on appeal).

The Fifth Circuit unfortunately appears to use the word "nexus" as whitewash to cover the cracks in its logic. 6/ Rather than forthrightly holding that an uncertified class' success depends in the first instance upon the success of the plaintiff, while a certified, but now "headless," class may continue to litigate, the Court invokes "nexus" and fails to explain the facts which lead to this finding of ultimate fact. However, the fact remains that since Rodriguez, the Fifth Circuit has not allowed an uncertified class to survive the loss of the individual plaintiff's claim.

6/ "Nexus" is a perfectly good Latin root which has been used honorably by this Court, e.g., Flast v. Cohen, 392 US 83 (1968), Bell v. Wolfish, ___US___, 99 SCt 1861, 60 LEd 2d 447 (1979). It is not the word, but the unexplained use of it which hides the real holdings of the Circuit Court.

II. The holding below that the plaintiff could not represent those emplcyees suffering racial discrimination in employment policies conflicts with decisions of other circuits.

The Circuit Court held that

> Ms. Armour has no claim in common with the other putative class members. She herself admitted that she has not been a victim of discrimination in hiring or pay. [7/]

597 F2d at 49. The Court apparently is abandoning its earlier "across-the-board" approach to class suits, see, e.g., Johnson v. Georgia Highway Express, Inc., 417 F2d 1122 (5th Cir 1969), in favor of the "same-impact" test found in Hill v. Western Electric Co., Inc., 596 F2d 99 (4th Cir 1979), cert. denied 48 USLW 3291 (29 October 1979). 8/

We suggest that Rodriguez does not mandate an abandonment of the "across-the-board" standard. The Rodriguez Court noted three reasons why the plaintiffs were not members of the class they purported to represent:

> [First]*** these plaintiffs lack the qualifications to be hired as line drivers. *** [Second, they failed] to move for class certification prior to trial. *** [Third,] the vote by members of the class rejecting a merger of the city- and line-driver collective-bargaining units [conflicted with] the demand in the plaintiffs' complaint for just such a merger. (footnotes omitted)

431 US at 403-5.

At least two Circuits have agreed that the "across-the-board" approach to Title VII classes has not been overruled by this Court. The Eighth Circuit held, both before and after Rodriguez, that present or former employees may appropriately represent applicants in Title VII cases. Reed v. Arlington Hotel Co., 476 F2d 721, 722-24 (8th Cir 1973), cert. denied 414 US 854 (1973); Donaldson v. Pillsbury Co., 554 F2d 825, 827, 831-32 (8th Cir 1977), cert. denied 434 US 856 (1978); United States Fidelity

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7/ Petitioner disputes this factual conclusion of the Court. She testified that she had applied for re-employment but had been turned down.

8/ See Comment, "The Proper Scope of Representation in Title VII Class Actions: A Comment on East Texas Motor Freight System, Inc., v. Rodriguez," 13 Harv CR-CLL Rev 175 (1978).

& Guaranty Co. v. Lord, 585 F2d 860, 862, 865 (8th Cir 1978), cert. denied 99 SCt 1228 (1979). The District of Columbia Circuit has held likewise in Gray v. Greyhound Lines, East, 545 F2d 169, 176 (DC Cir 1976).

This conflict among (and within) the Circuits has persisted for too long, resulting in numerous appeals and a waste of judicial resources.

III. The ruling below is inconsistent with the rulings of this Court on mootness of class actions.

If Ms. Armour's claim had become moot instead of being dismissed, the fate of the class claims would have been the opposite. We submit that, under the precedents of this Court, the class claims would have survived the mootness of the representative's claim.

In Kremens v. Bartley, 431 US 119, 130 (1977), the Court held

> we have never adopted a flat rule that the mere fact of certification of a class by a District Court was sufficient to require us to decide the merits of the claims of unnamed class members when those of the named parties had become moot.

We submit that the holding in United Airlines, Inc. v. McDonald, 432 US 385 (1977), is the logical counterpart of the Kremens holding. In United Airlines, the named plaintiffs had settled their individual claims after an adverse ruling on class certification. If the Armour logic were applied to United Airlines, no class could have been certified because of the lack of a class representative with a winning claim. This Court did not hold that the whole case was moot but allowed other potential class members to intervene after final judgment for the express purpose of appealing the adverse class determination decision. This Court did not make a distinction in United Airlines between an appeal by the representative of a putative class (whose claim was by

then moot) or by intervenors when it held

> The District Court's refusal to certify [the class] was subject to appellate review after final judgment at the behest of the named plaintiffs, as United concedes. (footnote omitted)

432 US at 393.

Either a class determination is subject to appellate review or it is not. It defies common sense to make such review only occassionally available depending on the timing and fortunes of the named plaintiffs' individual facts.

In Sosna v. Iowa, 419 US 393, 402 n. 11, (1975), this Court noted,

> There may be cases in which the controversy involving the named plaintiffs is such that it becomes moot as to them before the district court can reasonably be expected to rule on a certification motion. In such instances, whether the certification can be said to "relate back" to the filing of the complaint may depend upon the circumstances of the particular case and especially the reality of the claim that otherwise the issue would evade review. (Emphasis added.)

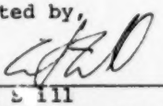
In this action, whether Ms. Armour's claim was lost or moot, the denial of class certification and the issues raised by the class claims will evade review because of the administrative prerequisites for Title VII cases. The statute of limitations for such cases would have run even under the tolling doctrine announced in American Pipe & Construction Co. v. Utah, 414 US 538 (1974).

The anomolous possibility exists that class claims could be pressed on appeal by a class representative who had "settled" (regardless of the terms of settlement) yet such claims would be barred if the class representative had been held (by the appellate court) not to have been the victim of discrimination.

Conclusion

For the reasons stated in this Petition, a writ of certiorari should issue to review the judgment and opinion of the Fifth Circuit.

Submitted by,



Edward E. Hill
Susan Williams Reeves
Suite 400 Commerce Center
2027 1st Avenue North
Birmingham, AL 35203
205/322-6631

APPENDIX

Ida Vene ARMOUR, Plaintiff-Appellant,

v.

CITY OF ANNISTON, d/b/a Anniston Memorial Hospital, and Northeast Alabama Regional Medical Center Board, Defendants-Appellees.

No. 77-1778.

United States Court of Appeals, Fifth Circuit.

June 13, 1979.

Before MORGAN, FAY and RUBIN, Circuit Judges.

FAY, Circuit Judge:

Ida Armour appeals from an adverse judgment on her Title VII[1] claims. She argues that the evidence was insufficient for the court as finder of fact to conclude that her discharge was justified. In addition, she complains that the trial judge erred in denying her motion for a class action certification. We affirm.

We briefly iterate the facts insofar as they demonstrate that the trial judge's factual determinations were not clearly erroneous, Fed.R.Civ.P. 52(a). Mrs. Armour, a black female, became a nurse's aide at Anniston Memorial Hospital (the Hospital) on March 16, 1966. On January 13, 1972 she was granted a leave of absence to enter the Hospital as a patient for treatment of a back problem. During this stay, Mrs. Armour and Mrs. Mildred Laney, a white registered nurse who had previously supervised Mrs. Armour, argued over Mrs. Armour's use of a radio at 2:30 A.M. Concerned that Mrs. Armour's midnight interlude might not facilitate the sleep of Mrs. Armour's 82 year old roommate who was scheduled for surgery in the morning, Mrs. Laney demurred. She later reported the incident to the Director of Nursing and a summary was placed in Mrs. Armour's file.

Due to the radio incident, relations between Mrs. Laney and Mrs. Armour were not cordial. Consequently, Mrs. Armour was removed from Mrs. Laney's shift. Her position on her former shift was then filled. Upon her return to work, Mrs. Armour was assigned to the second shift in the pediatric unit. She worked in this unit for five days prior to February 20, 1972. On February 20, 1972, Mrs. Armour reported for work and left a short time later. The parties' stories differ on the crucial question of the circumstances of Mrs. Armour's departure that day. The Hospital presented witnesses who testified that Mrs. Armour said she was leaving because she did not like to work with babies, who could not communicate their ailments. Mrs. Armour asserts that her reason was that she had no one to care for her own child while she worked. She testified that she was excused from work on February 20th for this reason. On the next day, Mrs. Armour called the Hospital to say that she could not work because she had no baby sitter. Yet she admitted to attending a meeting without her child during the time for which she was scheduled to work. Under her employment contract, Mrs. Armour was subject to termination for leaving or not appearing for work without permission.

1. 42 U.S.C. § 2000e *et seq* (1976).

On February 22, 1972, Mrs. Armour filed complaints with the Civil Service Board concerning the radio incident and the shift assignment. She also requested a leave of absence. The Hospital responded to the charge and also reported that Mrs. Armour left work without permission because she refused to work in pediatrics. The Hospital requested that Mrs. Armour be terminated. The Civil Service Board denied Mrs. Armour's request and approved the Hospital's request for authority to terminate her.

On June 7, 1972, Mrs. Armour filed a complaint with the Equal Employment Opportunity Commission, alleging racial discrimination as the cause of her discharge. A copy of the complaint was served on the Hospital on May 10, 1974. A determination of "reasonable cause" was made by the Commission on September 16, 1974, and a notice of her right to institute a civil action was sent to Mrs. Armour on September 24, 1975. Thereafter, she filed this lawsuit. In her complaint, she asserted that her dismissal was a result of her race and of a request made by her in 1966 that black as well as white employees be referred to by courtesy titles. She requested back pay, reinstatement, a declaratory judgment and an injunction against future discrimination. On June 8, 1976, she amended her complaint to include a class action. On July 22, 1976, the court held a hearing and refused to certify the class.

A final judgment was entered against Mrs. Armour individually on March 8, 1977. The trial judge held alternatively that Mrs. Armour had failed to establish a prima facie case of Title VII discrimination[2] and that, even if she had, the Hospital had proved that her discharge was prompted not by race, but by her failure to report to work.

2. The trial judge construed *Washington v. Davis*, 426 U.S. 229, 96 S.Ct. 2040, 48 L.Ed.2d 597 (1976), a section 1983 discrimination case, to require proof of discriminatory intent in Title VII cases as well. Mrs. Armour argues that the court committed reversible error on this point. We do not reach the question, however, because even if Mrs. Armour had established a prima facie case, it would have foundered under the court's alternative finding that her dismissal was justified. We therefore hold only that the trial court was not clearly erroneous in finding that the Hospital had carried its burden of proof in showing that the discharge was not a product of discrimination. *See International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 362, 97 S.Ct. 1843, 52 L.Ed.2d 396 (1977).

3. After Mrs. Armour's termination, the city of Anniston turned over the ownership and direction of the hospital to the newly established Regional Medical Center Board and changed its

I. *THE INDIVIDUAL CLAIM*

[1, 2] We uphold the trial court's decision that the Hospital was justified in discharging Mrs. Armour. The trial court was presented with conflicting evidence regarding the circumstances surrounding Mrs. Armour's absence from work and the Hospital's reasons for terminating her. Mrs. Armour testified that she left work and remained absent due to her inability to obtain a baby sitter. The Hospital presented witnesses who specifically refuted these facts and denied that Mrs. Armour had been excused from work on account of her responsibilities at home. Likewise, Mrs. Armour presented circumstantial evidence that her termination was racially motivated and the Hospital presented evidence that she was terminated for her failure to report for work. It is not our province on appeal to make the credibility choices necessary to decide this case. We are satisfied that there was ample evidence upon which the court could have made its finding. Constrained as we are by the clearly erroneous standard of Rule 52, we must uphold the trial court's acceptance of the Hospital's version of the facts surrounding Mrs. Armour's absence from work and its reasons for discharging her.

II. *THE CLASS ACTION*

[3] In addition to her individual claim, Mrs. Armour moved for the certification of a class consisting of all former and present black employees and applicants for employment at the Anniston Memorial Hospital and its successor entity, the Northeast Alabama Regional Medical Center.[3] The trial court conducted a hearing and thereafter

declined to certify the class. We need not assess the correctness of the court's decision, since we hold that, in view of our affirmance of the dismissal of Mrs. Armour's individual claim, she lacks the nexus necessary to represent the class of discriminatees. *Davis v. Roadway Express, Inc.*, 590 F.2d 140 (1979); *Camper v. Calumet Petrochemicals, Inc.*, 584 F.2d 70 (5th Cir. 1978) (*per curiam*); *Satterwhite v. City of Greenville*, 578 F.2d 987 (5th Cir. 1978) (en banc), *petition for cert. filed*, 47 U.S.L.W. 3465 (Jan. 9, 1979).

The question here is whether an individual can represent a class after the dismissal of her individual claim has been affirmed on appeal where the trial court has held a class certification hearing and incorrectly[4] refused to certify the class. In *East Texas Motor Freight v. Rodriguez*, 431 U.S. 395, 97 S.Ct. 1891, 52 L.Ed.2d 453 (1977), the Supreme Court held that it was error to certify a class after its representative was found not to have a nexus with the class due to an adverse ruling on his individual claims. Following *Rodriguez*, in *Satterwhite* we affirmed the improper[5] refusal to certify a class where the class representative was found at trial and on appeal to have no nexus to the class due to the lack of merit of her individual claim. In neither *Rodriguez* nor *Satterwhite* did the plaintiff move for a class certification hearing, and none was held. Finally, in *Davis* we held that *Rodriguez* controls where the trial court initially certified a class, but after a hearing decertified it; the representative could not represent the class under Fed.R. Civ.P. 23(a)(4) since, by the time the denial of the class certification was reviewed on appeal, it was clear that the representative had no individual cause of action.

[4] Although *Satterwhite* noted in dictum that the absence of a class certification hearing at trial might make a difference in deciding whether to allow as a class representative an individual whose own claim had already been adjudicated against him,[6] *Davis* recognized that, even where a class certification hearing has been held, a critical inquiry is whether the individual continued to have a nexus with the class sufficient to pass muster under Rule 23(a)(3). This is nothing more than saying that a class representative must *meet all* the criteria of Rule 23(a). Among those criteria are the separate requirements that the representative be able adequately to represent the class and that she have claims typical of the other class members. Although we have no other reason to question Mrs. Armour's ability adequately to represent the class, we nonetheless deny her the right to represent the class, since both a nexus with the class and adequacy of representation are necessary ingredients under Rule 23(a).

[5] On the facts of this case, "including the facts developed at the trial of the plaintiffs' individual claims,"[7] Mrs. Armour has no claim in common with the other putative class members. She herself admitted that she has not been a victim of discrimination in hiring or pay. At this point in the litigation it is also clear that Mrs. Armour has not been the victim of racial discrimination in her termination. Having suffered no discrimination at the hands of the defendants, Mrs. Armour is prevented by Rule 23 from representing this class.

Here, as in *Satterwhite*,[8] there is no reason to expect hardship to befall putative and unknown class members. No one has come forward to join the class or to intervene on appeal. No one has been bound by Mrs. Armour's attempt to establish a class. Finally, the same considerations applicable to the statute of limitations question in *Satterwhite* apply here.

Accordingly, we AFFIRM the trial court's findings as to Mrs. Armour's individual claim and AFFIRM the refusal to certify the class.

Affirmed.

ALVIN B. RUBIN, Circuit Judge, dissenting in part:

I concur in Part I of the opinion. I respectfully dissent from Part II of the court's opinion affirming the trial court's refusal to certify the case as a class action.

When a plaintiff who has filed suit individually and as the representative of a class loses her individual case, her capacity to act as a representative is not ipso facto terminated. If this were the result, there would be little reason for a trial court ever to certify a class expeditiously. The short shrift procedure would be to sever the representative's personal claims and try them: if she succeeds, class action questions can be dealt with later; if she fails, the troublesome class action is swiftly dispatched.

Rule 23(c)(1), Federal Rules of Civil Procedure, mandates that class action certification be considered at the outset of a suit: "As soon as practicable." For many reasons, the appropriateness of class action proceedings must be dealt with at the start of a suit: to give due process notice to class members in 23(b)(3) actions that require such notice; to enable both plaintiffs and defendants properly to prepare for the trial by way of discovery and other procedures; to enable putative (b)(2) or (b)(3) class members to know whether or not the running of the statute of limitations on their individual (b)(2) or (b)(3) claims has been interrupted; and to determine whether the named plaintiffs are qualified to represent the class. *See generally* 7A C. Wright & A. Miller, *Federal Practice and Procedure: Civil* § 1785 (1972).

If a plaintiff who appears as a class representative fails to press for class action certification, later is adjudged to have no personal claim, and this adjudication results in her loss of any potential nexus with the class, we have refused to remand the action for consideration of certification as of the time when that issue should originally have been considered. *E. g., Satterwhite v. City of Greenville*, 5 Cir. en banc 1978, 578 F.2d 987, *cert. applied for*, 1979, 47 U.S.L.W. 3465.

In *Satterwhite*, a female applicant for employment filed a class action "on behalf of all present and prospective female employees of the city." *Id.* at 990. Once the court determined that she had no grounds for her individual claim of sex discrimination in hiring, it then considered whether she had the requisite nexus with even a part of the putative class. The lack of any identity of interest with female employees or discharged employees, together with the plaintiff's own lack of diligence in pursuing the class action claims and the procedural problems of *nunc pro tunc* determinations caused us to find neither the requisite nexus between Mrs. Satterwhite and the present and prospective female employees of the city that had never hired her nor any other adequate reason to remand for a belated class hearing. My brethren observe that in *Satterwhite* we noted in dictum that the absence of a class certification hearing might make a difference in deciding whether to allow a person to act as a class representative after her own claim had been decided adversely to her. That "dictum" was, however, a part of the rationale by which the decision was reached. The vigor-

name to the Northeast Alabama Regional Medical Center.

4. We assume, although we do not decide, that the trial court's decision was incorrect.

5. In *Satterwhite*, the court assumed, arguendo, that the trial court materially erred by failing to hold a class certification hearing. 578 F.2d at 993 and n. 7. *Compare King v. Gulf Oil Co.*, 581 F.2d 1184 (5th Cir. 1978) (no prejudice shown).

6. 578 F.2d at 995 n. 10. Footnote 10 notes that whether the representative moves for a certification hearing bears on his ability adequately to represent the class. This proposition stems from *Rodriguez*, where the Court considered adequacy of representation as a factor, in addition to nexus, in determining whether the representative met Rule 23(a) criteria.

7. 431 U.S. at 406 n. 12, 97 S.Ct. at 1898. It is clear that the trial court did not violate the rule that a trial court should not consider the merits of the class representative's claim in order to determine whether a class should be certified. *Huff v. N. D. Cass Company of Alabama*, 485 F.2d 710 (5th Cir. 1973) (en banc). Indeed the court repeatedly cautioned Mrs. Armour's counsel that he should not present at the certification hearing any evidence which was relevant only to the merits of the case.

8. 578 F.2d at 996-97.

ous dissent did not differ as to this. *See id.* at 1001. (Godbold, J., dissenting). I am unable to consider this expression smoke in the judicial wind.

Mrs. Armour is black and female, and she had been a hospital employee. She originally sought to represent a class composed of "all black former and present employees and applicants for employment" at the hospital. "Nexus" with a class does not depend on the merit of the class representative's personal claim; it requires a sufficient stake in the outcome to establish that the representative is still acting as a class member and not merely as a volunteer or crusader. *See id.* at 992, 993 94 n.8 and 996. Despite the adjudication of her individual claim, Mrs. Armour still had an identity of interest with at least part of the putative class to assure her stake in the outcome. She pressed for a class certification hearing, the trial judge held one, and I think incorrectly, refused to certify the class. My brethren decline even to review that decision, thus making it conclusive. Despite my full respect for the intellect and diligence of federal district judges in general, and for the ability of the trial judge in this case in particular, I do not think that their rulings in such matters should be beyond appellate scrutiny.

If there is doubt that Mrs. Armour can adequately represent the class, that question should be determined after an evidentiary hearing in the trial court. Here, unlike *Satterwhite*, we do not know the size of the proposed class, whether or not its members are aware of the suit or what statute of limitations problems lurk in the background. It may be that Mrs. Armour lacks a claim in common with all of the members of the class she initially sought to represent, but in Title VII actions brought by class representatives who had at one time been employees, we have frequently confirmed class certification on behalf of broadly defined classes including persons not yet hired at the time the suit was filed. *E. g., Watkins v. Scott Paper Co.*, 5 Cir. 1976, 530 F.2d 1159, 1164 & n.1, *cert. denied*, 429 U.S. 861, 97 S.Ct. 163, 50 L.Ed.2d 139; *Pettway v. American Cast Iron Pipe Co.*, 5 Cir. 1974, 494 F.2d 211, 217. If the plaintiff sought to represent a class defined too widely, the trial court might, after an adequate hearing, certify a different class. I would reverse the denial of class action certification, remand for a hearing concerning the appropriate class and Mrs. Armour's ability to represent that class and for further class action proceedings.

UNITED STATES COURT OF APPEALS

Fifth Circuit

DENIALS OF REHEARING EN BANC

(Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12)

Group 1 -Denials where no member of the panel nor Judge in regular active service on the Court requested that the Court be polled on rehearing en banc.

Group 2 -Denials after a poll requested by a member of the panel or a Circuit Judge in regular active service.

Group 3 -Denials on the Court's own motion after a poll requested by a member of the panel or a Circuit Judge in regular active service.

Title	Docket Number	Date of Denial	Citation of Panel Decision
GROUP 1			
Amor v. Wainwright	79-1003	9/28/79	S.D.Fla., 601 F.2d 184
Armour v. City of Anniston	77-1778	8/20/79	N.D.Ala., 597 F.2d 46
Hudson v. Neiman-Marcus Co.	78-2312	8/21/79	N.D.Tex., 599 F.2d 447
Kenney v. Estelle	79-1265	9/25/79	S.D.Tex., 601 F.2d 584
Lone Star Steel Co. v. U. S.	78-2154	9/28/79	I.C.C., 600 F.2d 492
Sotto v. Wainwright	79-1003	9/28/79	S.D.Fla., 601 F.2d 184
U. S. v. De La Fuente	78-5765	10/ 1/79	S.D.Tex., 601 F.2d 1193
U. S. v. Flanagan	78-5271	9/26/79	W.D.Tex., 592 F.2d 253
U. S. v. Houde	78-5453	8/20/79	W.D.Tex., 596 F.2d 696
Uslife Corp. v. Federal Trade Commission	78-2989, 78-2990, 78-3445, 78-3450	9/24/79	F.T.C., 599 F.2d 1387
Uslife Credit Corp. v. Federal Trade Commission	78-2989, 78-2990, 78-3445, 78-3450	9/24/79	F.T.C., 599 F.2d 1387

FILED
9 Mar 77

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF ALABAMA
EASTERN DIVISION

IDA VENE ARMOUR,)
)
Plaintiff,)
)
v.) CIVIL ACTION NO. 75-G-2312-E
)
CITY OF ANNISTON,)
a municipal corporation,)
d/b/a "Anniston Memorial)
Hospital," and NORTHEAST)
ALABAMA REGIONAL MEDICAL)
CENTER BOARD, an unincorpo-)
rated association,)
)
Defendants.)

FILED IN CLERK'S OFFICE
NORTHERN DISTRICT OF ALABAMA
MAR 8 1977
JAMES E. VANDEGRIFT, CLERK
UNITED STATES DISTRICT COURT
BY:

ORDER OF FINAL JUDGMENT

In conformity with and pursuant to the Findings of Fact and Conclusions of Law entered contemporaneously herewith, it is by the court

ORDERED, ADJUDGED and DECREED that the plaintiff Ida Vene Armour have and recover nothing of the defendants City of Anniston and Northeast Alabama Regional Medical Center Board, and judgment is hereby entered for said defendants.

The costs of this action are hereby taxed to the plaintiff.

DONE this 8th day of March 1977.

UNITED STATES DISTRICT JUDGE
J. FOY GUIN, JR.

9 Mar 77

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FILED IN CLERK'S OFFICE
NORTHERN DISTRICT OF ALABAMA
MAR 8 1977
JAMES E. VANDEGRIFT, CLERK
UNITED STATES DISTRICT COURT
BY:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This cause came on for trial at Anniston, Alabama, on October 21, 1976. The court makes the following findings of fact and conclusions of law.

Findings of Fact

1. This action was brought by Mrs. Ida Vene Armour against the City of Anniston and the Northeast Alabama Regional Medical Center Board for racial discrimination in regard to her discharge from the Anniston Memorial Hospital on April 11, 1972.

2. Prior to May 14, 1974, Anniston Memorial Hospital was owned and operated by the City of Anniston, and its personnel policies were governed by the rules and regulations of the Anniston Civil Service Board. These rules and regulations covered the usual scope of subjects for civil service employees, including employment, transfer and discharge.

On May 14, 1975, pursuant to an ordinance of the City of Anniston, a public corporation was formed under the name of Regional Medical Center Board. This was authorized under Title 22, Sec. 190(1), Code of Alabama. The name of Anniston Memorial Hospital was changed to Northeast Alabama Regional Medical Center. The corporation has 15 directors, seven chosen by the City of Anniston, four named by other municipalities, two selected by Calhoun County, and two coming from the medical staff at the Center. The Regional Medical Center Board was not subject to the jurisdiction of the Anniston Civil Service Board.

At the time the public corporation was formed, there was no assumption by it of the obligations of Anniston Memorial Hospital. In 1975 the Medical Center issued some bonds. At that time, in consideration of a deed from the City conveying the real estate and personal property used by the Medical Center, the corporation assumed all existing liabilities of Anniston Memorial Hospital.

3. On or about March 16, 1966, the plaintiff, Ida Vene Armour, a black female, became a permanent employee of the Anniston Memorial Hospital as a Nurse Aide. During the first year of her employment, the plaintiff observed that blacks were not addressed by the same courtesy titles (Mr. or Mrs.) as white employees. She called this to the attention of Mrs. Marion R. Harris, the Director of Nursing at that time, and inquired as to the use of courtesy titles when addressing black aides and orderlies. Mrs. Harris undertook corrective action within the nursing staff, and on February 5, 1967, the Hospital Administrator, R. A. Conrad, issued a written policy concerning the use of courtesy titles. It was distributed and circulated throughout the hospital, and thereafter it became the published policy of the hospital in regard to this

issue. Upon the enactment of this policy, no complaints were made to the defendants concerning any failure to use courtesy titles as prescribed therein. The plaintiff made no further complaint to Mrs. Harris about the issue of courtesy titles; however, she did contact Mrs. Harris a number of times about various problems unrelated to racial discrimination.

4. During her employment at the Anniston Memorial Hospital, Mrs. Armour received an essentially negative employment record, indicating various incidents of misconduct which resulted in disciplinary action. On March 31, 1967, Mrs. Marion R. Harris, Director of Nursing Service, issued a reprimand to the plaintiff for absenteeism which occurred primarily on weekends or in conjunction with holidays and warned that a repetition of such conduct would lead to disciplinary action. On May 10, 1967, Mrs. Harris issued a memorandum which demoted Mrs. Armour to a "probationary status" because of her continued record of "excessive absenteeism." In addition to this, Mrs. Harris noted that the plaintiff's supervisor had reported that Mrs. Armour frequently created friction among fellow employees and did not take constructive criticism well. In closing, Mrs. Harris warned that she would be observing Mrs. Armour's attendance and performance records closely and that "any further disturbances will result in serious action from this office." Further disciplinary action was taken against Mrs. Armour on April 22, 1969, when the Hospital Administrator, Robert A. Conrad, issued a memorandum to the plaintiff stating that any further illness would require a medical statement from her doctor as to her ability to return to work. While these are specific references of Mrs. Armour's employment record, the court notes that there were numerous other examples of unfavorable conduct demonstrated by the plaintiff during her employment at the Anniston Memorial Hospital.

5. Although Mrs. Armour received an average rating on two reports filed in 1966 and 1968, entitled "Employee Progress Report," she did score well on an "Employee Merit Rating Report" filed in 1966. However, she did not receive a favorable rating in the same type of report in 1967. The only two favorable comments in this latter report were that Mrs. Armour usually gave effort and attention to her work and, secondly, that her work output was consistently good. However, this last statement was qualified by the observation that the plaintiff did not fully meet the daily requirements of the job. The remaining part of the report noted the following:

(1) The plaintiff was frequently absent with or without good cause.

(2) The plaintiff had a consistent disregard for scheduled time requirements.

(3) The plaintiff's work indicated occasional error or poor judgment.

(4) The plaintiff's proficiency in required skills or knowledge of her job was limited, and she required frequent instruction.

(5) In regard to initiative, it was noted that the plaintiff would act for herself within the limits of past experience, but that she sought direction on new matters.

(6) The plaintiff's attitude was noted as being uncooperative and showing no helpful interest beyond her own immediate job.

6. Although Mrs. Armour's poor employment record while working at the Anniston Memorial Hospital was kept in her personnel file and known by the officials of the Hospital, it was not a factor in the Hospital's decision to terminate the plaintiff's employment. Mr. Van Hekken, the Hospital's Personnel Director, testified during the trial that Mrs. Armour's discharge was not based upon prior acts of misconduct or her poor record as an employee, but to the contrary, Mrs. Armour's discharge was based

solely upon the abandonment of her job without permission and her refusal to return to work unless she was transferred to another shift.

7. The working schedule at the Anniston Memorial Hospital was divided into three shifts which required employees to work from 7:00 A.M. to 3:00 P.M. (the first shift), from 3:00 P.M. to 11:00 P.M. (the second shift), or 11:00 P.M. to 7:00 A.M. (the third shift). In addition to this shift schedule, there were also different units in the Hospital which were classified according to the type of medical service provided; i.e., the pediatric unit. The Civil Service Board rules and regulations stated that the Hospital could transfer an employee from one position to another, provided the employee was not transferred out of his or her classification title. In compliance with this provision, Mrs. Armour was assigned to work in various units and on each of the shifts during her employment at the Hospital.

8. Upon her request, Mrs. Armour was transferred on April 10, 1971, from the first to the third shift. She continued to work on this shift until she requested a leave of absence on January 13, 1972, and entered the defendant Hospital because of back problems. During her hospitalization as a patient, Mrs. Armour and Mrs. Mildred S. Laney, a white registered nurse, had an argument over the use of Mrs. Armour's radio. Although the details of the incident are in conflict, it appears that the plaintiff was sharing a room in the hospital with an 82-year-old patient who was scheduled for surgery the next morning. At or around 2:30 A.M. to 3:00 A.M. on the morning of the prospective operation, Mrs. Armour was loudly playing her radio in the room. Mrs. Laney, the third shift supervisor at the hospital, was

advised of the situation and took corrective action which resulted in an argument concerning the use of the radio. After the incident with Mrs. Laney, Mrs. Armour attempted to telephone Mrs. Harris, the acting administrator of the hospital at that time, but could not contact her. She also telephoned the personnel director of the hospital who directed her to turn the radio off and go to sleep. At approximately 3:30 A.M., the plaintiff turned off the radio and went to sleep. Mrs. Laney reported the incident to the Director of Nursing and a typed summary was placed in Mrs. Armour's personnel file.

9. The circumstances surrounding the use of the radio resulted in hard feelings between Mrs. Armour and Mrs. Laney, the supervisor of the third shift. Therefore, the plaintiff talked with Mrs. Harris and requested a new shift assignment upon her return to work. Mrs. Harris agreed that this might alleviate further problems and advised Mrs. Armour that she would be assigned to another shift upon her return. Consequently, the plaintiff's position on the third shift was filled by another Nurse Aide.

10. Upon her return to work on February 15, 1972, the plaintiff was assigned to duty on the second shift (3:00 P.M. to 11:00 P.M.) in the pediatric unit (Unit 7). She worked in this unit for five days, and on Sunday, February 20, Mrs. Armour reported to work and left a short time thereafter. The supervisor of the second shift inquired as to the reason for the plaintiff's leaving her job and asked if she was sick. Mrs. Armour replied that she was not sick and explained simply that she did not want to work in the pediatric unit. Later in the evening, Mrs. Armour telephoned Mrs. Harris to discuss the incident and explained that she had left her job assignment

because she could not be responsible for taking care of children who could not voice their complaints.

11. On February 21, the plaintiff called in before her duty on the second shift began and said that she could not report for work because there was no one to keep her youngest child during that time. That night, Mrs. Armour was present at a Civil Service Board hearing in regard to another employee of the Hospital from around 7:00 P.M. to midnight, without her child.

12. On February 22 at 8:45 A.M., Mrs. Armour filed two complaints with the Civil Service Board. One of them was based on the radio incident and the other was based on her shift assignment. On February 23, Mrs. Armour telephoned Mrs. Harris and told her of the complaints she had filed. Mrs. Harris mentioned the Employee Relations Committee of the Hospital as a body to hear complaints of the type that had been filed. Mrs. Armour indicated she would not go to that committee and asked what she could do to cover her absence from the Hospital. Mrs. Harris told her she could request an indefinite leave of absence, which would have to be approved by the Civil Service Board.

Copies of the complaints filed by Mrs. Armour with the Civil Service Board were mailed to the Hospital on February 25, with instructions to respond within 14 days. Mrs. Armour filed a request for an indefinite leave of absence "until restored to 11-7 shift." Mrs. Harris responded to the complaints on behalf of the Hospital on March 2. In that response she reported the facts concerning Mrs. Armour's leaving her work on February 20, and that Mrs. Armour had called in to say she would not return to work until she was allowed to work on the third shift. She stated further that since Mrs. Armour left her job without notice on

February 20 and had not returned to work as of March 2, it was respectfully requested that the Hospital be authorized to terminate Mrs. Armour's employment at the Hospital. On April 11, 1972, the Civil Service Board notified Mrs. Armour that her application for an indefinite leave of absence was disapproved, and that she was dismissed from her employment by the Hospital.

13. On June 7, 1972, Mrs. Armour filed a complaint with the Equal Employment Opportunity Commission, alleging racial discrimination as the cause of her discharge. A copy of the complaint was served on the Hospital on May 10, 1974. A determination of "reasonable cause to believe" was made by the Commission on September 16, 1974, and a notice of her right to institute a civil action was sent by it to Mrs. Armour on September 24, 1975. Thereafter, she timely filed this lawsuit.

On June 8, 1976, the plaintiff filed a motion to amend her complaint so as to make it a class action suit. She sought a certification of a class under Rule 23(b)(2), Federal Rules of Civil Procedure. An evidentiary hearing on the motion was held, and the motion was denied in an order of the court filed on July 22, 1976.

14. Pursuant to the case of Smith v. Universal Services, Inc., 454 F.2d 154, the entire file of the Equal Employment Opportunity Commission concerning their investigation, as it relates to this case, was admitted into evidence for the court's consideration. The following statistics concerning the racial composition of the Hospital's work force and the population of Calhoun County, Alabama, were derived from the data of the Equal Employment Opportunity Commission's file or presented as evidence during the trial. The Equal Employment Opportunity Commission's investigation in 1974 of the Anniston Memorial Hospital revealed

that 20.6 percent of the Nursing Service Department was black. There were no black supervisors, head nurses, or department heads; four of the 77 registered nurses were black; 22 of the 122 licensed practical nurses were black; 40 of the 78 full-time nurse aides were black. Statistics revealing the racial composition of the Hospital's work force in June 1976 were as follows:

White males	110	13.8%
White females	516	64.8%
Black males	38	4.8%
Black females	132	16.6%
TOTAL	796	100.0%

The population of Calhoun County is 103,092, of whom 17,584 (or 17%) are black).

15. While the Hospital is required by state and federal law to hire employees with a high school education for some positions, such as licensed type jobs, it also has established job descriptions which include a high school education as a requirement for certain other positions. Although this is a matter of choice and not required for accreditation purposes, it is consistent with the Hospital's policy of upgrading the institution by attempting to fill all positions with high school graduates. Consistent with this policy, the testimony of Mr. J. R. Van Hekken, Personnel Director of the Hospital, indicated that the Hospital desired employees with a high school education for the purpose of elevating them to a higher level of work. Also, the majority of applications received by the Hospital are from persons with a high school education. However, in the lower level jobs at the Hospital, such as nurse aide, a high school education is not required.

16. The personnel policies of the Anniston Memorial Hospital were once generally governed by the City of Anniston Civil Service Board rules and regulations. Exceptions to this were in the hiring of laborers, which included nurse aids, and nurses,

which included registered nurses and licensed practical nurses. At the present time, the Northeast Alabama Regional Medical Center is not subject to the control of the Civil Service Board of the City of Anniston.

The majority of applications for jobs at the Hospital are received from blacks, and 90 to 95 percent of these black applicants seek positions in unskilled or labor categories.

Conclusions of Law

1. The court has jurisdiction of this action under the Civil Rights Act of 1964, Title VII, 42 U.S.C. §§2000e, et seq.

2. In alleging racial discrimination under Title VII of the 1964 Civil Rights Act for her discharge by the Anniston Memorial Hospital, the plaintiff initially must establish a prima facie case of discrimination before the burden of producing evidence shifts to the defendants. James v. Stockham Valves and Fittings Company, 394 F. Supp. 434 (1975).

3. The general standard for establishing a prima facie case of employment discrimination in federal court under Title VII or 42 U.S.C. §1981, §1983, in past years has been simply couched in terms of impact. However, as to public bodies, this view was recently dispelled by the Supreme Court in Washington v. Davis, ___ U.S. ___, 96 S. Ct. 2040, 48 L. Ed. 2d 597 (1976). In examining the adverse racial impact of the entrance exam given by the Washington, D.C., police department, the Court held that a showing of intent was necessary to make out a prima facie case against a local government. It is important to note that the racial impact of the entrance exam in this case was challenged solely on constitutional grounds under 42 U.S.C. §1981. Further applications of the Supreme Court's standard of

intent rather than impact are found in Austin Independent School District v. United States, ____ U.S. ____, ____ S. Ct. ____, 50 L. Ed. 2d 603 (1977); and Village of Arlington Heights v. Metropolitan Housing Development Corporation, ____U.S. ____, 97 S. Ct. 555, 50 L. Ed. 2d 450 (1977).

4. As of this date, Harrington v. Vandalia Butler Board of Education, 418 F. Supp. 603 (1976) is the only decision addressing the issue of whether the intent standard of Washington v. Davis supra, should be applied in cases brought against state and local governments under Title VII. In that case, the Federal District Court in Ohio held that a female teacher of girls' physical education was not required to prove intentional acts of discrimination in order to recover under Title VII of the Civil Rights Act for disparity of working conditions. In stating simply that the plaintiff did not have to prove intentional acts of discrimination on the part of the defendants, the court failed to explicitly define an appropriate standard to be followed under Title VII. Instead, it completely ignored a genuine analysis of the facts and legal concepts and casually stated that there was nothing in Washington v. Davis, supra, to support the proposition that the plaintiff (in the Harrington case) must prove intentional acts of discrimination in order to recover under Title VII. However, there is nothing in Washington which supports the premise that the plaintiff does not have to prove intentional acts of discrimination in order to recover under Title VII. The court in Harrington attempted to support its ruling by circuitously reasoning that Washington reaffirmed the decision of Griggs v. Duke Power Co., 401 U.S. 424, 91 S. Ct. 849, 28 L. Ed. 2d 158 (1971).

To the contrary, the Supreme Court, in commenting on the standard to be applied under Title VII, stated simply:

> "We have never held that the constitutional standard for adjudicating claims of invidious racial discrimination is identical to the standards applicable under Title VII, and we decline to do so today." Washington v. Davis, 48 L. Ed. 2d 597, 607.

Moreover, the court in Harrington attempted to support its ruling by incorrectly asserting that Washington v. Davis, supra, reaffirmed the decision of Griggs v. Duke Power Co., supra. In quoting language from Griggs, i.e., "Congress directed the thrust of the Act to the consequences of employment practices, not simply the motivation", 401 U.S. at 432, 91 S. Ct. at 854, the court in Harrington misled the reader to believe that the Supreme Court had included the above quote in its opinion of Washington v. Davis, supra. To the contrary, the Supreme Court made no such statement in Washington, nor did it clearly state that the decision of Griggs v. Duke Power Co., supra, was reaffirmed.

5. Whether the extension of Title VII to state and local government employment means that impact will not suffice and intent is no longer relevant, is decidedly an open question. It hinges upon what constitutional grant of power Congress has relied upon in extending the coverage of Title VII over state and local governments. If Congress is seen, as in Fitzpatrick v. Bitzer, ____ U.S. ____, 96 S. Ct. 2666, 49 L. Ed. 2d 614 (1976), to have extended Title VII in implementation of the Fourteenth Amendment, no more stringent standard would be appropriate than that for which the Fourteenth Amendment calls, i.e., intent. If Congress is alternatively assumed to have acted in the exercise of its power to regulate interstate commerce, one comes to the Supreme Court's decision in National League of Cities v. Usery, ____ U.S. ____, 96 S. Ct. 2465, 49 L. Ed. 2d 245 (1976), in which the Court struck down an attempt by Congress to regulate employment decisions of state and local governments under the Commerce Clause powers of

Congress. Without the Commerce Clause as an appropriate alternative basis, it would appear that Congress' extension of Title VII to state and local governments cannot supplant the intent standard of Washington v. Davis, supra, with the more stringent impact standard of Griggs v. Duke Power Co., supra.

In view of this analysis, this court believes that the intent standard, i.e., that there must be proof of discriminatory racial purpose as in Washington v. Davis, supra, should be applied in civil rights litigation brought under Title VII (or 42 U.S.C. §1981). The Supreme Court held in Fitzpatrick, supra, at 620, that the authority for the 1972 amendment extending Title VII to state and local governments was the Fourteenth Amendment:

> "There is no dispute that in enacting the 1972 Amendments to Title VII to extend coverage to the States as employers, Congress exercised its power under §5 of the Fourteenth Amendment." p. 620 n.9.

Therefore, it is simple logic that a statute can be no broader than its constitutional base. Consequently, since the extension of Title VII to state and local governments rests upon the Fourteenth Amendment, the statute cannot be any broader than the constitutional authority upon which it is based. It follows that in Title VII cases against a state or local government, the statute is to be construed in accordance with the constitutional test adopted by the Court in Washington, supra; i.e., there must be proof of discriminatory racial purpose.

6. Therefore, the court finds that the plaintiff has failed to establish a prima facie case of discrimination under Title VII in that she has been unable to prove that the defendant Hospital had the requisite discriminatory intent when it discharged her on April 11, 1972. This finding of an absence of discriminatory intent is supported by an analysis of the statistical data concerning the racial composition of Hospital employees and Calhoun County and the simple facts of the case.

7. Pursuant to Rule 803(6) and (8) of the Federal Rules of Evidence, and the decision of Smith v. Universal Services, Inc., 454 F.2d 154, the entire file of the Equal Employment Opportunity Commission in connection with this matter was admitted into evidence. However, it is important to note that Rule 805 of the Federal Rules of Evidence provides:

> "Hearsay included within hearsay is not excluded under the hearsay rule if each part of the combined statements conforms with an exception to the hearsay rule provided in these rules."

Consequently, as this court stated at the time the Equal Employment Opportunity Commission's file was admitted into evidence, its admission was limited by Rule 805, and there are no findings in this opinion based on hearsay within hearsay.

8. Based upon the statistical data concerning the racial composition of Hospital employees and Calhoun County, the court finds that the requisite discriminatory intent on the part of the Hospital was not established by such data, even prima facie. The statistical figures revealing that black males comprise 4.8 percent of the Hospital's work force and black females 16.6 percent, totaling 21.4 percent, does not establish a pattern of racial discrimination. To the contrary, it shows that the Hospital's work force contains a larger proportion of blacks to whites than the entire population of Calhoun County, which is 17 percent black. Also, the Hospital is not guilty of a discriminatory intent because there were no black supervisors, head nurses or department heads, only four black registered nurses out of a total of 77, 22 black licensed practical nurses out of a total of 122, and 40 (52%) black nurse aides in 1974. This pattern of racial composition in the Hospital's work force was not the result of an intent to discriminate, but rather it was caused by an absence of qualified blacks. With 90 to 95 percent of all black applicants applying for positions as unskilled laborers, the Hospital is limited in hiring blacks to the positions of registered nurse

and licensed practical nurse, and promoting blacks to positions of supervisor, head nurse and department head. These positions have established educational and licensing requirements set by state and federal law; so, in order for blacks to be hired and promoted to these jobs, they must meet the established standards. Moreover, there is no discriminatory purpose in the Hospital's policy of including a high school education in the descriptions of labor type jobs. The evidence shows that such policy is for the purpose of upgrading the institution and that it does not screen black applicants in a discriminatory manner. To the contrary, blacks hold a majority of the nurse aide positions; i.e., 52 percent of the 78 nurse aides are black. Therefore, the description which includes a high school education has had no discriminatory effect. In conclusion, the court finds that the statistical data presented in this case does not establish proof of a discriminatory racial purpose on the part of the defendant Hospital.

9. Alternatively, the court finds that, based upon the facts of this case, the defendant Hospital was justified in discharging Ida Vene Armour and that the reasons for the discharge do not indicate any discriminatory intent whatsoever. In support of this proposition, the court finds that the sworn testimony during the trial establishes that the plaintiff's poor employment record and general incompatibility with fellow employees was not the reason for the plaintiff's discharge. Further, the unfortunate circumstances surrounding the incident involving the plaintiff and another Hospital employee over the playing of the plaintiff's radio did not contribute to Mrs. Armour's dismissal, nor did the fact that a report on the incident was kept in her personnel file contribute to her discharge. Sworn testimony during the trial indicated that the information in Mrs. Armour's personnel file was

not a factor in her termination. To the contrary, the testimony and exhibits presented during the trial indicate that the supervisors and administrators at the Hospital took a conciliatory attitude toward Mrs. Armour's poor employment record and that they attempted to provide constructive advice and help in this matter. Furthermore, following the radio incident, Mrs. Harris, the Director of Nursing Services, honored Mrs. Armour's request for a transfer to another shift.

10. The court concludes further that the sole reason for the discharge of Mrs. Armour was that she abandoned her job without seeking or receiving prior permission on February 20, 1972, and that she refused to return to work unless she was transferred to another shift. The court finds that such conduct constitutes insubordination, totally inexcusable, and which need not be tolerated by any employer.

11. In accordance with the foregoing findings of fact and conclusions of law, this court finds that the plaintiff Ida Vene Armour is not entitled to relief under the Civil Rights Act of 1964, Title VII, 42 U.S.C. §§2000e., et seq. Judgment will be entered accordingly.

DONE this 8th day of March 1977.

UNITED STATES DISTRICT JUDGE
J. FOY GUIN, JR.

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF ALABAMA
EASTERN DIVISION

IDA VENE ARMOUR, Plaintiff, v. CITY OF ANNISTON, a municipal corporation, d/b/a "Anniston Memorial Hospital," and NORTHEAST ALABAMA REGIONAL MEDICAL CENTER BOARD, an unincorporated association, Defendants.	)	CIVIL ACTION NO. 75-G-2312-E

FILED IN CLERK'S OFFICE
NORTHERN DISTRICT OF ALABAMA
NOV 18 1976
JAMES B. VANDEGRIFT, CLERK
UNITED STATES DISTRICT COURT
BY: Doreen Style

AMENDED ORDER

The court's order heretofore entered on July 22, 1976, in the above-styled case is amended to read as follows:

This cause came on to be heard by the court on June 14, 1976, at Anniston, Alabama, on the motion of the plaintiff for certification of a class pursuant to Rule 23(b)(2), Federal Rules of Civil Procedure. For the reasons given below, that motion is denied.

This action was brought against the City of Anniston, which formerly operated the Anniston Memorial Hospital, and the Northeast Alabama Regional Medical Center Board, which presently operates a hospital at the same premises as the former Anniston Memorial Hospital. The complaint seeks (1) declaratory and injunctive relief prohibiting the defendants from discriminating against the plaintiff because of her race, (2) back pay, and (3) reinstatement of the plaintiff to the job she formerly held.

Rule 23(b)(2), F.R.C.P., has repeatedly been held by the courts to be applicable for class certification only in those

cases where the plaintiff primarily seeks injunctive relief; and while damages may be sought incidental to such injunctive relief, Rule 23(b)(2) class certification is not appropriate if the action is primarily for monetary damages. See Jones v. Diamond, 519 F.2d 1090 (5th Cir. 1975); Haynes v. Logan Furniture Mart, Inc., 503 F.2d 1161 (7th Cir. 1974); LaMar v. H & B Novelty & Loan Co., 489 F.2d 461 (9th Cir. 1973).

In this case, ordering injunctive and declaratory relief and reinstatement against the City of Anniston would be meaningless, since that defendant City is no longer the employer. Only the present employer (the Board) could give that relief. At the Rule 23 hearing the only portion of her burden of proof which the plaintiff carried, in regard to the time prior to the change of ownership, was the fact of discharge. While she might represent a class of persons discharged prior to the change of ownership, it would have been the City which did the discharging -- but the City no longer operates the hospital and would therefore not be answerable for any kind of equitable relief. Such a class certification as to the City, against whom no equitable relief can be granted, would therefore be inappropriate. Equal Employment Opportunity Commission v. McMillan Bloedel Containers, Inc., 503 F.2d 1086 (6th Cir. 1974); Slack v. Havens, 522 F.2d 1091 (9th Cir. 1975).

The plaintiff is not an appropriate class representative of those employees who may have been discriminatorily discharged by the present employer (the Board), because she was not discriminatorily discharged by the Board; she never worked for the Board. Further, she has failed to prove that the Board is an employer which could grant the requested relief. To make a successor liable, it is necessary to prove that the successor took over the hospital with knowledge or notice of the pending claim,

charge, or suit. Equal Employment Opportunity Commission v. McMillan Bloedel Containers, Inc., 503 F.2d 1086 (6th Cir. 1974); Slack v. Havens, 522 F.2d 1091 (9th Cir. 1975). The evidence is closed for Rule 23 class certification purposes, and there has been no proof that the successor had any notice or knowledge of the plaintiff's claim of discrimination.

The plaintiff is not an appropriate representative of a class of persons who sought employment from the Board, because of a lack of proof that she ever sought employment from the Board. While she sought employment at the hospital, the evidence does not indicate which employer she sought employment from.

For the reasons given above, the plaintiff has failed to prove that she is an appropriate representative of any certifiable class under Rule 23(b)(2), F.R.C.P., and the motion for class certification is therefore DENIED, and it is ORDERED that this case shall proceed as an individual action.

DONE and ORDERED this 18th day of November 1976.

UNITED STATES DISTRICT JUDGE
U. W. FOY GUIN, JR.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1979

NO. 79-5649

IDA VENE ARMOUR,

PETITIONER,

V.

CITY OF ANNISTON, ETC., ET AL,

RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

WALTER J. MERRILL
POST OFFICE BOX 580
ANNISTON, ALABAMA 36202

COUNSEL FOR RESPONDENTS.

IN THE

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IDA VENE ARMOUR,

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RESPONDENTS' BRIEF IN OPPOSITION

The Respondents, City of Anniston, dba Anniston Memorial Hospital, and Northeast Alabama Regional Medical Center Board, respectfully request that this Court deny the petition for writ of certiorari, seeking review of the Fifth Circuit's opinion in this case. That opinion is reported at 597 F2nd 46. The denial of a rehearing en banc is reported at 604 F2nd 671.

QUESTIONS PRESENTED.

1. Were the findings of fact by the trial court, which had the opportunity to judge the credibility of the witnesses, clearly erroneous with regard to the individual claim of petitioner?

2. If the findings of the District Court were not clearly erroneous with respect to the individual claim of petitioner, was the opinion of the Fifth Circuit erroneous with respect to the

class action under the pleadings and facts of this case?

REASONS WHY THE WRITS SHOULD BE DENIED.

1. Neither the decision below nor the record raise the Questions Presented as set out in the petition.

There are four Questions Presented in the petition. The first three deal with the class action aspect of the case and the fourth relates to the individual claim of petition. This brief will first address the individual claim.

In the petition Question Presented Four places the individual claim of petition in the light of having been denied by the District Court in a finding that was not based on credible evidence. This is simply not supported by the facts. In the Findings of Fact made by the District Court there was a review consisting of several pages of the facts pertaining to the employment record of petitioner. The opinion summed up the situation as follows:

> "The court finds that, based upon the facts of this case, the defendant Hospital was justified in discharging Ida Vene Armour and that the reasons for the discharge do not indicate any discriminatory intent whatsoever. In support of this proposition, the court finds that the sworn testimony during the trial establishes that the plaintiff's poor employment record and general incompatibility with fellow employees was not the reason for the plaintiff's discharge. Further, the unfortunate circumstances surrounding the incident involving the plaintiff and another Hospital employee over the playing of the plaintiff's radio did not contribute to Mrs. Armour's dismissal, nor did the fact that a report on the incident was kept in her personnel file contribute to her discharge. Sworn testimony during the trial indicated that the informtion in Mrs. Armour's personnel file was not a factor in her termination. To the contrary, the testimony and exhibits presented during the trial indicate that the supervisors and administrators at the Hospital took a conciliatory attitude toward Mrs. Armour's poor employment record and that they attempted to provide constructive advice and help in this matter. Furthermore, following the radio incident, Mrs. Harris, the Director of Nursing Services, honored Mrs. Armour's request for a transfer to another shift."

"The court concludes further that the sole reason for the discharge of Mrs. Armour was that she abandoned her job without seeking or receiving prior permission on February 20, 1972, and that she refused to return to work unless she was transferred to another shift. The court finds that such conduct constitutes insubordination, totally inexcusable, and which need not be tolerated by any employer."

The facts pertaining to the discharge of petitioner are vastly different from the way they are made to appear in the petition, and from the way they are referred to in Question Presented Four.

The Fifth Circuit reviewed the record on appeal and wrote as follows:

"We uphold the trial court's decision that the Hospital was justified in discharging Mrs. Armour. The trial court was presented with conflicting evidence regarding the circumstances surrounding Mrs. Armour's absence from work and the Hospital's reasons for terminating her. Mrs. Armour testified that she left work and remained absent due to her inability to obtain a baby sitter. The Hospital presented witnesses who specifically refuted these facts and denied that Mrs. Armour had been excused from work on account of her responsibilities at home. Likewise, Mrs. Armour presented circumstantial evidence that her termination was racially motivated and the Hospital presented evidence that she was terminated for her failure to report for work. It is not our province on appeal to make the credibility choices necessary to decide this case. We are satisfied that there was ample evidence upon which the court could have made its finding."

It is apparent that the individual claim of petitioner lacked merit, and that it was not clearly erroneous for the District Court to make such a finding.

The "nexus" mentioned in the petition is not some new or additional requirement imposed by the Fifth Circuit for class actions. The opinion in that Court makes it clear that the requirement of nexus "is nothing more than saying that a class representative must meet all the criteria of Rule 23 (a)." This same test was required by the Supreme Court in East Texas Motor Freight

v. Rodriguez, 435 US 395, 97 S Ct 1891. In that case the Court discussed some typical class actions and added, "But careful attention to the requirements of Fed Rule Civ Proc 23 remains nonetheless indispensable."

In this case petitioner's only charge with respect to herself is wrongful discharge, yet her offer, as set out in the amendment to her complaint is to represent all members of a class composed of all black former and present employees and applicants for employment at the Medical Center, alleging a policy or practice of racial discrimination "in employment practices by the defendants."

The record shows that petitioner received employment on the job she applied for. She received every pay raise given to other employees. She had no problem as an employee. Her only complaint concerned the termination of her employment which did not involve any racial discrimination. The situation was summarized by the Fifth Circuit in this way:

"On the facts of this case, 'including the facts developed at the trial of the plaintiffs' individual claims,' Mrs. Armour has no claim in common with the other putative class members. She herself admitted that she has not been a victim of discrimination in hiring or pay. At this point in the litigation it is also clear that Mrs. Armour has not been the victim of racial discrimination in her termination. Having suffered no discrimination at the hands of the defendants, Mrs. Armour is prevented by Rule 23 from representing this class."

East Texas Motor Freight v. Rodriguez paraphrased the holding of the Fifth Circuit in this language, using the names of the parties in that case:

"In short, the trial court proceedings made clear that Rodriguez, Perez, and Herrera were not members of the class of discriminatees they purported to represent. As this Court has repeatedly held, a class representative must be part of the class and possess the same interest and suffer the same injury as the class members."

As pointed out by the Fifth Circuit,

> "There is no reason to expect hardship to befall putative and unknown class members. No one has come forward to join the class or to intervene on appeal. No one has been bound by Mrs. Armour's attempt to establish a class."

One would suspect that the attempt to establish a class action in this case is really more of an effort to establish an attorney's fee.

2. The pleadings and facts of this case do not call for or justify a ruling on the much broader Questions Presented in the petition, and the decision of the Fifth Circuit presents no reason for the grant of certiorari.

CONCLUSION.

For these reasons, the petition for certiorari should be denied.

Respectfully submitted,

WALTER J. MERRILL
POST OFFICE BOX 580
ANNISTON, ALABAMA 36202

COUNSEL FOR RESPONDENT.